IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

JACKY STEWART and BRANDY ANDERSON, individually, and on behalf Of all others similarly situated,

Plaintiffs,

v.

FLOWERS FOODS, INC., FLOWERS BAKING CO. OF BATESVILLE, LLC, and AMBASSADOR PERSONNEL, INC.,

Defendants.

Case No. 1:15-cv-01162

JURY DEMAND
FLSA COLLECTIVE ACTION

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR APPROVAL OF 29 U.S.C. § 216(b) NOTICE AND CONSENT FORMS AND TO ORDER DISCLOSURE OF CURRENT AND FORMER EMPLOYEES

I. INTRODUCTION

Plaintiffs, Jacky Stewart and Brandy Anderson, brought this action against their employer on behalf of themselves and all others similarly situated for violations of the Fair Labor Standards Act in accordance with 29 U.S.C. § 216(b). Plaintiffs bought this action on behalf of two separate collective groups, of which they are members of both. The first collective group, or "Distributor Collective Group" ("Distributor Group" or "Distributors") consists of all individuals who, through a contract with Defendants or otherwise, performed or perform as Distributors for Defendants under an agreement with Flowers Baking Co. of Batesville and who were classified by Defendants as independent contractors at any time within the past three (3) years.

The second collective group, or the "Employee Collective Group" ("Employee Group" or

"Employees") consists of all individuals who were hired by Defendant Flowers Baking Co. of Batesville, LLC, through Defendant Ambassador Personnel, Inc., who were classified by Defendants as employees, and who regularly worked hours for which no compensation was paid and worked over forty hours per week in any area serviced by Flowers Baking Co. of Batesville, without receiving proper overtime compensation, at any time within the past three (3) years. During the applicable time periods, the named Plaintiffs have been members of both collective groups.

II. FACTUAL BACKGROUND

The Flowers Defendants hire individuals, some of whom they classify as independent contractors, while others are classified as employees, to distribute their products by delivering them to grocery stores and stocking the products on store shelves. Workers classified as "employees" are hired by Flowers Defendants through Defendant Ambassador. Defendants' distributors, whether classified as independent contractors or employees, regularly worked over 40 hours per week without receiving proper overtime compensation. Although the Flowers Defendants classify many of its employees as "independent contractors," they are in reality employees. This misclassification allows Defendants to avoid the overtime requirements of the Fair Labor Standards Act and to avoid payroll tax obligations.

As stated above, Jacky Stewart and Brandy Anderson, the representative Plaintiffs, worked for Defendants, have been members of the proposed groups, and are adequately suited to represent the classes. While collective action notice can be supported merely by allegations in the Complaint, Plaintiffs have come forward with testimony setting forth the rationale for conditional certification. Plaintiffs have given detailed testimony explaining Defendants' FLSA violations and easily meeting the "similarly situated" standard for conditional certification.

Plaintiff Jacky Stewart has worked as a distributor with Flowers Defendants since approximately February 2014. (Declaration of Stewart, attached as Exhibit A, p. 1). Plaintiff Brandy Anderson has worked as a distributor with Flowers Defendants since approximately September 2014. (Declaration of Anderson, attached as Exhibit B, p. 1). As distributors, Plaintiffs Stewart and Anderson have contracts with Flowers Defendants that outline their compensation and job performance expectations. (Ex. A, p. 1; Ex. B, p. 1). Distributors are paid a "piece rate" based upon the amount of bakery products that Flowers Defendants' customers sell. (Ex. A, p. 1; Ex. B, p. 1). Distributors' main job duties are to deliver the Flowers Defendants' products to their customers. (Ex. A, p. 1; Ex. B, p. 1). Distributors typically arrive at Flowers' warehouse at a specified time early in the morning to load their trucks with Flowers products, and drive to Flowers' various customers, on a route pre-determined by the Flowers Defendants. (Ex. A, p. 1; Ex. B, p. 1). Distributors arrive at stores by a time pre-determined by the Flowers Defendants, stock the customers' shelves with Defendants' product, and remove stale products from the stores. (Ex. A, p. 1; Ex. B, p. 1). Distributors are required to maintain their market seven days a week. (Ex. A, p. 1; Ex. B, p. 1).

Distributors are required to use the Flowers Defendants' handheld computer system to maintain their markets. (Ex. A, p. 1; Ex. B, p. 1). The computer tells Distributors the price of the products, the quantity to deliver, information regarding historical sales, and other similar information. (Ex. A, p. 2; Ex. B, p. 2). The information is maintained in a central computer system controlled by the Flowers Defendants. (Ex. A, p. 2; Ex. B, p. 2). On occasion, Distributors use the handheld computer to place orders for customers. (Ex. A, p. 2; Ex. B, p. 2). However, the Flowers Defendants often change the orders placed by Distributors, even if Distributors disagree with the change. (Ex. A, p. 2; Ex. B, p. 2). Indeed, Distributors are required to deliver and stock any product that the Flowers Defendants demand. (Ex. A, p. 2; Ex. B, p. 2).

The Flowers Defendants retain the authority to decide prices and make other product-related decision. (Ex. A, p. 2; Ex. B, p. 2). The Flowers Defendants negotiate directly with their customers to determine the price of products, which products will be sold in each store, shelf space to be allocated to the products, sale or promotional prices, and terms of payment. Defendants' Distributors are all held to the same performance standards. (Ex. A, p. 2; Ex. B, p. 2). They are required to follow the same protocol when delivering to customers. (Ex. A, p. 2; Ex. B, p. 2). The Flowers Defendants monitor Distributors' deliveries and orders using the computer system. (Ex. A, p. 2; Ex. B, p. 2). Additionally, Flowers has the ability to terminate Distributors' contracts if they do not meet the company's performance expectations. (Ex. A, p. 2; Ex. B, p. 2).

The Flowers Defendants' Distributors do not engage in open market competition with others. (Ex. A, p. 2; Ex. B, p. 2). Rather, Distributors work exclusively for the Flowers Defendants, perform the job assigned to them, and do not have the opportunity to work for others due to the demands of the job with the Flowers Defendants. (Ex. A, p. 2; Ex. B, p. 2). The economic reality is that Distributors work solely for Flowers Defendants on a full-time and continuing basis. Distributors regularly and routinely work over 40 hours per week, but are not provided overtime compensation for hours worked over 40 per week. (Ex. A, p. 2; Ex. B, p. 2).

Prior to becoming a Distributor, Plaintiffs Stewart and Anderson worked for Flowers through the temporary staffing agency, Defendant Ambassador. (Ex. A, p. 2; Ex. B, p. 2). During that time, Plaintiffs performed substantially the same job duties as Distributors. The Defendant would regularly not pay the employees for all of the hours they actually worked, which would also have the effect of often denying the Plaintiffs overtime pay for work in excess of 40 hours per week. (Ex. A, p. 2; Ex. B, p. 2). Accordingly, neither Defendant Ambassador nor the Flowers Defendants regularly provided proper pay to these employees and proper overtime compensation to these workers for hours worked in excess of 40 per week. (Ex. A, p. 2; Ex. B, p. 2).

These factual allegations far exceed the *O'Brien* standard, as explained below, for collective action treatment in that they show a common illegal pay policy in violation of the FLSA that applies to Plaintiffs and other similarly situated employees, who were erroneously denied overtime pay. *O'Brien v. Ed. Donnelly Enterprises, Inc.*, 575 F.3d 567 (6th Cir. 2009). Accordingly, court supervised notice under § 216(b) of the FLSA is appropriate and necessary.

III. DEFENDANTS' FLSA VIOLATIONS

Although the *O'Brien* standard does not require inquiry into the merits of the specific FLSA violation alleged, some background information is helpful.

A. Defendant's FLSA Violations Against the "Distributor Group"

i. *Flowers Defendants Improperly Classify Distributors as "Independent Contractors."*

In determining whether a plaintiff is an employee or independent contractor for purposes of the FLSA, the Court analyzes the "economic reality" of the employment relationship. *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). Triers of fact must look to the extent the alleged employee is economically dependent upon the employer. *Bartels v. Birmingham*, 332 U.S. 126 (1947). In *Rutherford*, which is the seminal case in this area of the law, the U.S. Supreme Court set forth six (6) factors, commonly known as the "economic reality" test, for courts to consider in determining whether an individual is an employee under the FLSA or an independent contractor. These factors were subsequently codified:

(a) The nature and degree of the putative employer's control as to the manner in which the work is performed;
(b) The putative employee's opportunity for profit or loss depending upon his/her managerial skill;
(c) The putative employee's investment in equipment or materials required for the task, or the putative employee's employment of other workers;
(d) Whether the services rendered by the putative employee require special skill;
(e) The degree of permanency and duration of the working relationship;
(f) The extent to which the services rendered by the putative employee are an integral part of the putative employer's business.

29 C.F.R. § 500.20(h)(4). Recently, the six factors "economic reality" test has been reaffirmed as the controlling analysis in the Sixth Circuit, and as proper by the Department of Labor. *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015); DOL No. 2015-1 (*Appx. 1)*. [1]

These factors are not exhaustive, and no single factor is determinative. *Chao v. Mid-Atl. Installation Serv., Inc.*, 16 Fed. Appx. 104, 107 (4th Cir. 2001) (citing *Lauritzen*, 835 F.2d at 1535). Rather, this balancing test is designed to determine, under the totality of circumstances, whether "the workers depend upon someone else's business for the opportunity to render service or are in business for themselves." *Superior Care*, 840 F.2d at 1059; *Lilley*, 958 F.2d at 750.

To determine whether a plaintiff is an "employee" under the FLSA, the term is not limited to its common meaning. *Rutherford Food Corp.*, 331 U.S. at 728. Instead, "employee" under the FLSA must be interpreted with "great breadth and generality" to accomplish the goals of the law. *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 143 (6th Cir. 1977) (citing *United States v. Rosenwasser*, 323 U.S. 360, 363 n. 3 (1945) (the term "employee" has been given "the broadest definition that has ever been included in any one act"). In continuation of this broad interpretation, on July 15, 2015, the D.O.L. issued Administrator's Interpretation No. 2015-1,

[1] *See also*, *Imars v. Contractors Mfg. Servs.*, 1998 U.S. App. LEXIS 21073 (6th Cir. 1998); *Lilley v. BTM Corp.*, 958 F.2d 746, 750 (6th Cir. 1992); accord *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d. Cir. 1988); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1383 (3d Cir. 1985).

concluding that most workers are employees under the FLSA's broad definition. (*Appx. 1).*

In light of consistent interpretation by the courts, and the testimony set forth in Exhibits A and B, Plaintiffs are easily able to show a reasonable basis for this case. Defendants retain significant control over the degree and manner in which work is performed. Defendants control virtually all aspects of the relationship, including pricing, service and delivery agreements, product selection, promotional pricing, and advertisements. (Ex. A, p. 2; Ex. B, p. 2).

An analysis of the "economic realities test" will support the conclusion that, in reality, Distributors are Defendants' employees. It is worth noting that Defendants' Employee Group and Distributor Group perform substantially similar job duties. Indeed, the only difference between members of the two groups is how they are classified by Defendant. Defendant will be unable to demonstrate that its Distributors are independent contractors.

B. FLSA Violations against the "Distributor Group" *and* the "Employee Group"

In their Answers, Defendants assert that even if Distributors are employees, Distributors *and* Employees are nonetheless exempt from the overtime provisions of the FLSA on the basis of the "outside sales exemption" and the "motor carrier exemption." Neither are applicable to Plaintiffs, and Defendants will be unable to carry their burden of proving otherwise.

i. Plaintiffs are NOT Exempt from the FLSA by the Outside Sales Exemption.

The FLSA provides an exemption to overtime pay for an employee working "in the capacity of outside salesman." 29 U.S.C. § 213(a). An outside salesman is one "whose primary duty is making sales within the meaning of section 3(k) of the [FLSA]" and is "customarily and regularly engaged away from the employer's place of business in performing such primary duty." 29 C.F.R. § 541.500. However, a driver who delivers and sells products may **only** qualify as exempt under this exemption if his **primary duty** is making sales. 29 C.F.R. §

541.504(a). An employee's primary duty is the "principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a).

Strikingly similar cases within the Sixth Circuit demonstrate that members of the Distributor Group are not subject to the outside sales exemption. *Hodgson v. Klages Coal & Ice Co.*, 435 F.2d 377 (6th Cir. 1970) involved "routemen" whose duties included surveying shelves space, preparing invoices for stock, and receiving payment. In holding that the exemption did not exist, the Sixth Circuit noted that routemen did not participate in or influence the store's initial decision to buy products, nor did they make the sale to the customer. *Id.* at 383. Rather, the routemen were primarily responsible for delivering orders to customers in amounts that were prearranged by prior agreement with Klages Coal & Ice Co. *Id.* at 383. For these reasons, the Court found that the outside sales exemption did not apply because, "it cannot be said on the evidence that the regular job of the routemen was to open up new accounts." *Id.* at 384.

Likewise, in *Killion v. KeHE Distributors, LLC,* 761 F.3d 574 (6th Cir. 2014), the Sixth Circuit reversed the district court's finding of summary judgment on the outside sales exemption. The plaintiffs were "sales representatives" for the defendant, a food distributor. *Id.* at 577. The plaintiffs' primary job duties were stocking shelves and reordering merchandise when a store was low. *Id.* The Sixth Circuit Court of Appeals found material evidence demonstrating that making sales was not the primary duty of the plaintiffs. Importantly, the Court noted that the reordering of merchandise does not constitute a sale for FLSA purposes, as a matter of law. *Id.* at 583. The Court found sufficient evidence by which a jury could conclude that plaintiffs do not actually make sales. Specifically, the Court notes that Defendants' account managers actually controlled the volume of sales through "plan-o-grams" and restrictions on ordering. *Id.* at 584. Further, the Court noted that plaintiffs did not have authority to change or rearrange displays and shelf space; these decisions were made by corporate. *Id.*

The reasoning of Sixth Circuit in *Hodgson* and *Killion* apply directly to Plaintiffs' claims in the instant case. Plaintiffs' primary duties do not involve making sales as that term is contemplated by the FLSA, and Defendants will be unable to carry their burden of proving otherwise.

ii. *Plaintiffs are NOT Exempt from the FLSA by the Motor Carrier Exemption.*

The FLSA provides an exemption for employees whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to section 31502 of Title 49, or the Motor Carrier Act. 29 U.S.C. § 213(b). Generally, the Secretary of Transportation has the power to establish maximum hours for employees who

> (1) Are employed by carriers whose transportation of passengers or property by motor vehicle is subject to his jurisdiction under section 204 of the Motor Carrier Act . . . and (2) engage in activities of a character directly affecting the safety or operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the Motor Carrier Act.

29 C.F.R. § 782(a).

However, in 2008, Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act Legacy for Users Technical Corrections Act of 2008, PL 110-244, § 306(a), 112 Stat. 1572 ("SAFETEA-LU"). SAFETEA-LU created an exception to the motor carrier exemption. In pertinent part, SAFETEA-LU provides that an employee shall receive overtime when that employee is an individual:

> (1) who is employed by a motor carrier or private motor carrier . . .;
> (2) whose work, **in whole or in part**, is defined
>   a. as that of a driver . . .; and
>   b. as affecting the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways in interstate or foreign commerce . . .; and
> (3) who performs duties on motor vehicles weighing 10,000 pounds or less.

PL 110-244, § 306(c), 122 Stat. 1572 (emphasis added). Thus, SAFETEA-LU extends the benefits of the FLSA overtime provisions to employees whose work, even "in part," involves the operation of motor vehicles weighing 10,000 pounds or less. *Id.*

It is undisputed that Plaintiffs often use their personal vehicles, weighing less than 10,000 pounds, to complete their job duties for Defendants. (Answer of Flower Foods, D.E. # 12; ¶ 54). Therefore, contrary to Defendants' contention in their Answer, the motor carrier exemption cannot apply to Plaintiffs. *See Aikins v. Warrior Energy Servs. Corp.*, 2015 U.S. Dist. LEXIS 32870, *16 (S.D. Tex. Mar. 17, 2015) ("the law does not exclude a motor carrier employee from FLSA coverage merely because his or her work also involves operating heavier vehicles").

Many jurisdictions interpret the "in whole or part" language of the SAFETEA-LU to mean that any employee whose work with small vehicles is more than *de minimis* fits under what has come to be known as the "small vehicle exception." *Garcia v. W. Waste Servs., Inc.*, 969 F. Supp. 2d 1252, 1260 (D. Idaho 2013); *Bedoya v. Aventura Limousine & Transp. Service, Inc.*, 2012 U.S. Dist. LEXIS 128826, 2012 WL 3962935, *4 (S.D. Fla. Sept. 11, 2012); *Mayan v. Rydbom Exp., Inc.*, 2009 U.S. Dist. LEXIS 90525, 2009 WL 3152136, *9 (E.D. Pa. Sept. 30, 2009); *McMaster v. E. Armored Servs., Inc.*, 2013 U.S. Dist. LEXIS 42721, 2013 WL 1288613, *4 (D. N.J. Mar. 26, 2013). Indeed, the only district court within the Sixth Circuit to examine this question found that the plain language of the statute, and supporting documents from the Department of Labor, support the interpretation that "where an employee combines more than *de minimis* work involving a vehicle provided in the small vehicle exception with work involving a vehicle not covered by that exception, the employee is entitled to overtime pay under the FLSA." *Byers v. Care Transp., Inc.*, 2015 U.S. Dist. LEXIS 128111 (E.D. Mich. Sept. 24, 2015).

Plaintiffs, and the putative class members will provide testimony demonstrating that their work with their personal vehicles, weighing less than 10,000 pounds, was not *de minimis;* therefore, Plaintiffs are not exempt from the overtime provisions of the FLSA by the motor carrier exemption.

C. STANDARD FOR FLSA COLLECTIVE ACTIONS

A. FLSA Collective Actions Generally

FLSA collective actions are very different than Rule 23 class actions. Courts distinguish "collective actions" brought pursuant to § 216(b) from Rule 23 "class actions." *See Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006). The FLSA's "collective action" provision allows one or more employees to bring an action for overtime compensation "on behalf of herself or themselves and other employees similarly situated." 29 U.S.C § 216(b); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001); *White v. MPW Indus. Servs., Inc*., 236 F.R.D. 363, 366 (E.D. Tenn. 2006). "The evident purpose of the Act [FLSA] is to provide one lawsuit in which the claims of different employees, different in amount but all arising out of the same character of employment, can be presented and adjudicated, regardless of the fact that they are separate and independent of each other." *Shain v. Armour & Co.*, F. Supp. 488, 490 (W.D. Ky. 1941).

An FLSA collective action is not subject to the numerosity, commonality, typicality, and representativeness requirements of a traditional Rule 23 class action. *Whalen v. United States*, 85 Fed. Cl. 380, 383 (Fed. Cl. 2009). Also unlike Rule 23 class actions, employees and former employees of Defendant must affirmatively "opt in" by filing a written consent to join and to participate in this case if they wish. 29 U.S.C. § 216(b); *Hipp* 252 F.3d at 1216. A proposed notice is attached hereto as *Exhibit C*. A proposed Consent Form, to accompany the notice, is attached hereto as *Exhibit D*.

To serve the "broad remedial purpose" of the FLSA, courts are afforded the power to give notice to other potential class members to "opt-in" to Plaintiff's case. *Dybach v. Florida Dep't of Corr.,* 942 F.2d 1562, 1567 (11th Cir. 1991). *See also Hoffmann-LaRoche v. Sperling*, 493 U.S. 165, 170 (1989) ("[a] collective action allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources"); *Clark v. Dollar Gen. Corp.*, 2001 U.S. Dist. LEXIS 25976 (M.D. Tenn. May 24, 2001); *Crawford v. Lexington-Fayette Urban County Gov't,* 2007 U.S. Dist. LEXIS 6711 (E.D. Ky. Jan. 26, 2007). Proceeding as a collective action also serves the goal of "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged . . . activity." *Hoffmann-LaRoche*, 493 U.S. at 170. Additionally, early court-authorized notice protects against "misleading communications, by the parties, resolves the parties'" disputes regarding the content of any notice, prevents the proliferation of multiple individual lawsuits, assures joinder of additional parties is accomplished properly and efficiently, and expedites resolution of the dispute. *Id.* at 170-72; *Garner v. G.D. Searle Pharm*, 802 F. Supp. 419, 422 (M.D. Ala.1991); *Yates v. Wal-Mart Stores, Inc.*, 58 F. Supp. 2d 1217, 1218 (D. Colo. 1999). In this case, notice also advises potential claimants to file their consents pursuant to § 216(b) before the running of the FLSA statute of limitations.

The standard for collective action notice "is a 'lenient one.'" *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995). It is considerably "less stringent than that for joinder under Rule 20(a) . . .[or] [Rule 23(b)(3)] that common questions 'predominate.'" *Grayson v. Kmart Corp.,* 79 F.3d 1086, 1096 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 435 (1996). An employee need only show that he is suing his employer for himself and on behalf of other employees "similarly situated" to warrant FLSA collective action treatment. *Grayson*, 79 F.3d at 1096. For a FLSA case, the "similarly situated" standard is met where the class members share similar job requirements and pay provisions. *Dybach*, 942 F.2d at 1567-68; *Belcher v. Shoney's, Inc.*, 927 F. Supp. 249, 251 (M.D. Tenn. 1996). The plaintiff's claims and job positions need not be identical to the potential opt-ins, they need only be similar. *Dybach*, 942 F.2d at 1567-68. The burden of showing plaintiff and potential opt-ins are "similarly situated" is met at the notice stage through detailed allegations in a complaint and supporting affidavits. *Grayson*, 79 F.3d at 1097; *Sperling v. Hoffman-LaRoche, Inc.*, 118 F.R.D. 392, 406-07 (D. N.J. 1988), *aff'd.,* 493 U.S. 165, 110 S. Ct. 482 (1989).

Once the court makes the preliminary determination that the potential plaintiffs are similarly situated, the case proceeds as a collective action throughout discovery. *See Mooney*, 54 F.3d at 1213; *Hoffman v. Sbarro,* 982 F. Supp. 249, 261-62(S.D.N.Y. 1997); *Herrera v. Unified Mgmt.*, 2000 U.S. Dist. LEXIS 12406, 6 Wage & Hour Cas.2d (BNA) 922 (N.D. Ill. 2000). Discovery is relevant thereafter both as to the merits of the case and for the second step in the collective action procedure where the court evaluates conflicting evidence developed in discovery to test the validity of the preliminary decision made at the notice stage. *See Mooney*, 54 F.3d at 1214; *Herrera*, 2000 U.S. Dist. LEXIS 12406. Indeed, allowing early notice and full participation by the opt-ins, "assure[s] that the full 'similarly situated' decision is informed, efficiently reached, and conclusive." *Sperling*, 118 F.R.D at 406. Once the notice and opt-in period is complete, the Court will have the benefit of knowing the actual makeup of the collective action.

B. FLSA Cases in the Sixth Circuit and the O'Brien Case

In August of 2009, the Sixth Circuit handed down the seminal case on FLSA collective actions in this jurisdiction. *O'Brien v. Ed. Donnelly Enterprises, Inc.*, 575 F.3d 567 (6th Cir. 2009). The plaintiffs brought two theories under the FLSA. First, they claimed they were required to work "off the clock." Second, they claimed the Defendants had electronically edited their time records. *Id.* at 573. In addressing the "decertification" standard, which is no less stringent that the phase one conditional certification and notice standard, the Sixth Circuit explained the leniency required. The Sixth Circuit stated that "showing a 'unified policy' of violations is **not** required." *Id.* at 584 (emphasis added).

Likewise, the Sixth Circuit expressly stated that the need for individualized assessments of opt in plaintiffs does **not** defeat collective action status. The *O'Brien* court explained:

> Both the district court and the defendant note that to determine whether a particular violation took place in this case requires an individualized analysis that examines the facts of each alleged violation. For this reason, the district court decertified, determining that individualized issues predominated.
>
> **But such a collection of individualized analyses is not required by the district court.** Under the FLSA, opt-in plaintiffs only need to be "similarly situated." While Congress could have imported the more stringent criteria for class certification under Fed. R. Civ. P. 23, it has not done so. **The district court implicitly and improperly applied a Rule 23-type analysis when it reasoned that the plaintiffs were not similarly situated because individualized questions predominated**.

Id. at 584-85 (internal citations omitted)(emphasis added).

This begs the question as to what proof is necessary. In *O'Brien*, the plaintiff suggested that a collective action is proper where the "'causes of action under the FLSA accrued at about the time and place in the approximate same manner of the named plaintiff would be similarly situated' to the lead plaintiffs." *Id.* at 585. The court rejected this on the ground that this standard was too restrictive and "more demanding than what the statute requires." *Id.*

> But in this case, the plaintiffs were similarly situated, because their claims were unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct. The claims were unified so, because plaintiffs articulated two common means by which they were allegedly cheated: forcing employees to work off the clock and improperly editing time sheets.

Id. at 585. Accordingly, the Sixth Circuit held that collective action status in FLSA cases is proper where "'claims were unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct." *Id.*

The court explained, "[T]he collective action serves an important remedial purpose. Through it, a plaintiff who has suffered only a small monetary harm can join a larger pool of similarly situated plaintiffs. That pool can attract effective counsel who knows that if the plaintiffs prevail, counsel is entitled to a statutorily required reasonable fee as determined by the court." *Id.* at 586 (citing *Hofman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989)). The Sixth Circuit stated that while "it is possible that representative testimony from a subset of plaintiffs could be used to facilitate the presentation of proof of FLSA violations…[w]e do not purport to create comprehensive criteria for informing the similarly-situated analysis." *O'Brien*, 575 F.3d at 585. Rather, "arguments concerning the individualized nature of the plaintiffs' claims are better suited for consideration at the decertification stage of a collective action." *Id.* (citing *Ware v. T-Mobile USA*, 828 F. Supp.2d at 956, n.10).

Since *O'Brien*, the Sixth Circuit has "implicitly upheld the two-step procedure in FLSA actions." *In re: HCR Manorcare, Inc.*, No. 11-3866, 2011 U.S. App. LEXIS 26241, at * 3-4 (6th Cir. 2011) (citing *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567 (6th Cir. 2009). This approach is further supported by Judge Trauger of the Middle District of Tennessee, who wrote that "[b]ecause the statute only requires that employees be 'similarly situated,' plaintiffs seeking to certify a collective action under the FLSA face a lower burden than those seeking to certify a class action under Federal Rule of Civil Procedure 23." *Ware v. T-Mobile USA*, 828 F. Supp. 2d 948, 951 (M.D. Tenn. 2011) (citing *O'Brien*, 575 F.3d at 584).

At this stage, Plaintiffs must meet only a minimal showing to be entitled to send notice to prospective Plaintiffs. See *Shabazz v. Asurion Ins. Serv*., 2008 U.S. Dist. LEXIS 29696 (M.D. Tenn. Apr. 10, 2008). Plaintiffs need only submit an affidavit sufficient to make a preliminary showing that prospective Plaintiffs are "similarly situated" and that there is a reasonable basis for Plaintiffs' claims. See *Miklos v. Golman-Hayden Cos*., 2000 U.S. Dist. LEXIS 22352 (S.D. Ohio Oct. 24, 2000). A notice and opt-in period will facilitate consolidated resolution of overtime claims.

D. RELATED FLOWERS CASE(S)

As further support for this Motion, Plaintiffs submit that in *Rehberg, et al. v. Flowers Baking Co. of Jamestown, LLC, et al.*, Dkt. No. 12-cv-00596, the United States District Court for the Western District of North Carolina, Charlotte Division, granted the plaintiffs' Motion for Conditional Certification and Judicial Notice on nearly identical claims filed against defendant Flowers Foods, Inc., and one of its regional bakeries, Flowers Baking Co. of Jamestown. Like the Plaintiffs in this case, the plaintiffs in *Rehberg* are or were employed by the defendants as distributors and performed essentially identical duties under the same conditions of employment. Like the Plaintiffs here, the *Rehberg* plaintiffs assert claims under the FLSA alleging that they have been misclassified by the defendants as "independent contractors" and are in fact employees that are not exempt from the overtime requirements of the FLSA. The Complaints filed in both cases contain substantially similar allegations: The Plaintiffs entered into Distributor Agreements with the regional bakeries and are governed by policies and procedures that are set unilaterally by Defendants. The Plaintiffs are required to pick up Defendant Flowers' bakery products from warehouses owned and operated by Defendants and deliver them to customers in a defined geographic territory. The Plaintiffs purchase distribution rights to certain product brands within a defined geographic territory, and deliver Defendant Flowers' products within a predetermined route, set by Defendants. The distributors are required to restock customers' shelves with fresh Flowers' products and remove or pull stale product. The distributor is responsible for leasing or purchasing his delivery vehicle and equipment. The Defendants determine the type of product and quantity that is delivered to each customer, and the Defendants can make adjustments to the quantity without consulting the distributors assigned to that particular customer. The Defendants reserve the right to change the quantity of a particular order; and, the distributor is required to deliver the changed amount, even if he disagrees.

On November 20, 2012, the plaintiffs in *Rehberg* filed a Motion for Conditional Certification and Judicial Notice which was granted by the Court in an Order dated March 22, 2013. (A copy of the District Court's Order granting the Motion to Conditionally Certify the Class is attached hereto as Exhibit E.) The reasoning used by the Court in granting the Motion is equally applicable here and should be instructive to the Court in considering this Motion.[2]

There are to date at least fourteen (14) other lawsuits that have been filed by Flowers distributors under the FLSA and/or various state wage and hour laws claiming that they have been misclassified as independent contractors and wrongfully denied overtime pay. See, *Morrow, et al v. Flowers Foods, Inc., et al.*, Dkt. No. 07-cv-00617 (U.S. District Court for the Middle District of Alabama); *Meredith v. Sara Lee Fresh, Inc et al.*, Dkt. No. 13-cv-02649 (U.S. District Court for the Northern District of California); *Porreca et al. v. Flowers Baking Co. of California, LLC, et al.*, Dkt. No. 15-cv-00732 (U.S. District Court for the Eastern District of California); *Martinez, et al. v. Flowers Foods, Inc., et al.*, Dkt. No. 15-cv-05112 (U.S. District Court for the Central District of California); *Coyle v. Flowers Foods Incorporated et al.*, Dkt.

[2] In fact, the district court granted the plaintiffs' Motion to Certify Class on March 24, 2015. The defendants applied for permission to appeal the decision certifying the class, which was denied by the Fourth Circuit Court of Appeals on May 21, 2015.

No. 15-cv-01372 (U.S. District Court of Arizona); *Brownfield, et al. v. Flowers Baking Co. of California, LLC*, Dkt. No. 15-cv-02034 (U.S. District Court for Eastern District of California); *Bowden, et al. v. CK Sales Company, LLC, et al.*, Dkt. No. 15-cv-13464 (U.S. District Court of Massachusetts); *Richard et al. v. Flowers Foods, Inc. et al.*, Dkt. No. 15-cv-02557 (U.S. District Court for the Western District of Louisiana); *Soares et al. v. Flowers Foods, Inc. et al.*, Dkt. No. 15-cv-04918 (U.S. District Court for the Northern District of California); *Rosinbaum, et al. v. Flowers Foods, Inc. et al.*, Dkt. No. 15-cv-00581 (U.S. District Court for the Western District of North Carolina); *Carr, et al. v. Flowers Foods, Inc., et al.*, Dkt. No. 15-cv-06391 (U.S. District Court for the Eastern District of Pennsylvania); *Neff, et al. v. Flowers Foods, Inc., et al.*, Dkt. No. 15-cv-00254 (U.S. District Court for Vermont); *Noll v. Flowers Foods, Inc., et al.*, Dkt. No. 15-cv-00493 (U.S. District Court of Maine); *Wordlaw, et al. v. Flowers Foods, Inc.*, Dkt. No. 15-cv-00187 (U.S. District Court for the Northern District of Georgia). Although, *Rehberg* appears to be the only one of the cases that has addressed the issue of conditional class certification.

E. NOTICE TO AND DISCLOSURE OF POTENTIAL CLASS MEMBERS

A. Plaintiff's Proposed Notice and Consent Forms are Fair and Adequate.

Plaintiffs' proposed Notice is attached as *Exhibit C*. Plaintiffs' proposed Consent is attached as *Exhibit D*. Plaintiffs' proposal for court approved Notice and Consent forms (*Exhibits C* and *D*) to the potential opt-ins are "timely, accurate, and informative," as required. *Hoffman-LaRoche*, 493 U.S. at 172. The Notice provides notice of the pendency of the action and of the opportunity to opt-in. Plaintiffs' legal claims are accurately described. Potential opt-ins are advised that Defendants are defending against the claims and that they are not required to participate. The Notice provides clear instructions on how to opt in and accurately states the prohibition against retaliation or discrimination for participation in an FLSA action. *See* 29

U.S.C. § 215(a)(3); *Reich v. Davis*, 50 F.3d 962, 964 (11th Cir. 1995). The Notice also describes the legal effect of joining the suit; describes the legal effect of not joining the suit; notes that the Court expresses no opinion regarding the merits of Plaintiffs' claims or Defendants' liability; and accurately states the prohibition against retaliation or discrimination for participation in an FLSA action. *See* 29 U.S.C. § 215(a)(3) (anti-retaliation provision).

Plaintiffs propose that the Notice and Consent forms be mailed by counsel for Plaintiffs via first class mail to (a) all alleged "independent contractors" of the Flowers Defendants within the last three years; and (b) all employees of the Flowers Defendants hired through Defendant Ambassador within the last three years. Those class members interested in participating would be required to file their consents with the Court within 90 days of the mailing. This is consistent with established practice under the FLSA. *Hoffman-LaRoche*, 493 U.S. at 172; *Garner*, 802 F. Supp. at 422 (cut-off date expedites resolution of action); *Hipp*, 164 F.R.D at 576 (120 day filing period); *Belcher,* 927 F. Supp. at 252-55 (exemplar of companywide notice).

Because the statute of limitations is daily destroying the injured employees' ability to collect damages, Plaintiffs also requests that Defendants be ordered to internally post the Notice prominently at Defendants' location(s) and enclose notices with the next regularly scheduled paycheck for members of the putative class. *See Brown v. Consol. Rest. Operations, Inc.,* 2013 U.S. Dist. LEXIS 127706 (M.D. Tenn. Sept. 6, 2013) at *21 (ordering that notice shall be posted by Defendant "prominently at Defendant's restaurant locations where employees congregate and shall distribute the Notices with current employees next regularly scheduled paychecks"); *Cranney v. Carriage Servs., Inc*., 2008 U.S. Dist. LEXIS 22630 at *16 (D. Nev. Feb. 29, 2008) (ordering notice to be posted in Defendants' locations, e-mailed to employees, publicized in employee newsletter as well as mailed to employees); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 493 (E.D. Cal. 2006) (first class mail and posting at workplaces constituted "best notice practicable" to the class); *Johnson v. Am. Airlines, Inc.*, 531 F.Supp. 957, 964 (N.D. Tex. 1982) (notice ordered to be posted on employee bulletin boards at defendant's flight bases); *Frank*, 88 F.R.D. at 679 (posting on bulletin boards); *Kane v. Gage Merch. Servs., Inc.*, 138 F.Supp.2d 212, 216 (D. Mass. 2001) (requiring the provision of employee's e-mail address).

The Notice and Consent forms are fair, accurate, and should be approved for distribution. Plaintiffs also request that the Consent forms be deemed "filed" on the date they are postmarked.

B. The Disclosure of Names and Addresses is Essential to Ensure Timely Notice

Plaintiffs have moved for an Order instructing Defendant to disclose a mailing list of all prospective plaintiffs employed within the last three years. Early disclosure of a mailing list for class members is a routine component of notice in collective actions. *Hoffman-LaRoche,* 493 U.S. at 170 ("District Court was correct to permit discovery of the names and addresses..."); *Grayson*, 79 F.3d at 111 (ordering production of mailing list). Indeed, such a mailing list is essential to timely notice. *See Hoffman-LaRoche*, 493 U.S. at 170 ("timely notice" required); *Johnson v. ECT Contr., LLC*, 2010 U.S. Dist. Lexis 14237 (M.D. Tenn. Feb. 18, 2010); *Bowman v. New Vision Telcoms., Inc.*, No. 3:09-cv-01115. Defendant should therefore be ordered to produce the last known addresses and last known telephone numbers for all prospective plaintiffs who worked for Defendants within the past three (3) years.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs request that their Motion for Approval of 29 U.S.C. § 216(b) Notice and Consent Forms and to Order Disclosure of Current and Former Employees be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Memorandum was sent via the Court's electronic filing system to all counsel of record on this the 15th day of December, 2015.

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